1941

Regulations, Reenactment, and the Revenue Acts

Robert C. Brown
Indiana University School of Law

HARVARD
LAW REVIEW

VOL. LIV JANUARY, 1941 NO. 3

REGULATIONS, REENACTMENT, AND THE REVENUE ACTS

TO what extent are administrative rulings interpreting revenue statutes binding on the courts? When such rulings have survived Congressional reenactment of the statute they purportedly construe, are they conclusive, or are they merely aids to its interpretation, to be given greater or less weight according to the circumstances, and to be considered only in connection with other proper aids to statutory interpretation which may be available to the courts?

These questions have recently become acute, in part because of two Supreme Court decisions within the last two years, *Helvering v. R. J. Reynolds Tobacco Co.*[1] and *Helvering v. Wilshire Oil Co.*[2] The opinion in the first of these cases on its face seems to require the answer that a regulation of the Bureau of Internal Revenue construing a federal revenue act which the Bureau is administering, and which has continued in effect during a reenactment of a provision thus construed, becomes itself a part of the law and is just as binding upon all concerned (including the courts) as the text of the statute itself.[3] The *Wilshire* case, however, managed, by the use of highly technical reasoning, to avoid this rule, and

[1] 306 U. S. 110 (1939).

[2] 308 U. S. 90 (1939). See notes on this case in (1939) 53 HARV. L. REV. 323, and (1940) 38 MICH. L. REV. 391. *Cf.* FCC v. Columbia Broadcasting System, 61 Sup. Ct. 152 (Nov. 25, 1940).

[3] For a general discussion of the application of this principle in federal revenue cases, see 1 PAUL AND MERTENS, THE LAW OF FEDERAL INCOME TAXATION (1934 & Supps.) §§ 3.16–3.20. There is an extensive collection of authorities, both federal and state, on the same problem in (1929) 73 L. Ed. 322 *et seq.*

refused to follow such a regulation where it was deemed undesirable to do so. But because of the reasoning on which it is founded, the latter decision offers no real assurance that the doctrine of the *Reynolds Tobacco* case has been repudiated. The theory continues to vex the lower federal courts in their consideration of disputed problems of interpretation of the internal revenue laws where previous administrative regulations had enunciated rules now disapproved by the Treasury.[4] It is therefore not surprising that this general problem has been the subject of considerable discussion [5] in academic and other circles.

I

It is the thesis of this article that there is nothing sacred in Treasury regulations or other administrative rulings. They are simply aids — often very helpful and of great weight, and sometimes even decisive — in interpretation of the statutes; but they are inherently no more binding than other devices that may be available. Nor should reenactment by Congress of the provision of the act thus construed render the interpretation binding, although

[4] A notable, but by no means the only, example of this is the still unsettled question as to whether the tax on the gift of a life insurance policy is to be measured by the cash surrender value of the policy (as the regulations provided until a fairly recent amendment) or by the higher cost of duplication of the policy at the date of gift, which is the present provision of the applicable regulation. The previous rulings adhering to cash surrender value were followed as to gifts made prior to the amendment, in Guggenheim v. Rasquin, 28 F. Supp. 322 (E. D. N. Y. 1939), and in Helvering v. Cronin, 106 F.(2d) 907 (C. C. A. 8th, 1939). The *Guggenheim* decision was, however, reversed in 110 F.(2d) 371 (C. C. A. 2d., 1940). Ryerson v. United States, 28 F. Supp. 265 (N. D. Ill. 1939) also applies the amended ruling to gifts made when the original regulation was still in effect; but to add to the confusion, this case was recently reversed. 114 F.(2d) 150 (C. C. A. 7th, 1940). These decisions are in disagreement not only as to the binding effect of the original rulings, but also (though, it seems, without much justification) as to their meaning The question has not yet been decided by the Supreme Court; but the lower federal courts are clearly embarrassed by the feeling that they must give some effect to the previous regulation, which survived several reenactments of the applicable provision of the act, and that they are therefore precluded from treating the question of the proper interpretation of the statute as an original one.

[5] See, especially, Paul, *Use and Abuse of Tax Regulations in Statutory Construction* (1940) 49 YALE L. J. 660; Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 COL. L. REV. 252; Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes* (1940) 88 U. OF PA. L. REV. 556.

that fact may add somewhat to the weight to be accorded the regulation. As a matter of fact, the regulations have been treated by the courts in exactly this way. But the Supreme Court has attempted to state a rigid rule, namely, that regulations construing reenacted statutes are absolutely binding. And therein lies the source of the trouble caused the Government, taxpayers, lower federal courts, and even the Supreme Court itself. But the latter can, when it desires, get out of the pit which it has dug for itself (as indeed it did in the *Wilshire* case).

Helvering v. R. J. Reynolds Tobacco Co. was not, however, a sporadic and unexpected formulation of a wholly new ruling; it was rather the culmination of a long series of cases, laying down the rule which, stated in its most indefinite terms, is to the effect that a ruling of a governmental department or bureau charged with the administration of a federal statute is presumably to be regarded by the courts as a proper interpretation of the statute, particularly if Congress had reenacted the statute thus construed while the ruling was in force. This doctrine has had its most frequent application in connection with the internal revenue laws.[6] One obvious reason for this is that such laws are amended and reenacted very frequently — more frequently probably than any other federal statutes. The rule has been applied mostly where the complicated and difficult income, excess profits, estate, and gift tax laws were involved, and occasionally in connection with controversies as to miscellaneous excise taxes.[7] It has also been applied, from an even earlier date, though not so frequently, in connection with the tariff acts. Thus it was used by the Supreme Court as early as 1888 in a controversy respecting the construction

[6] Typical cases on this general proposition are: United States v. Anderson, 269 U. S. 422 (1926); Brewster v. Gage, 280 U. S. 327 (1930); Poe v. Seaborn, 282 U. S. 101 (1930); Fawcus Machine Co. v. United States, 282 U. S. 375 (1931); Murphy Oil Co. v. Burnet, 287 U. S. 299 (1932); Massachusetts Mutual Life Ins. Co. v. United States, 288 U. S. 269 (1933); Morrissey v. Commissioner, 296 U. S. 344 (1935); Morgan v. Commissioner, 309 U. S. 78 (1940). Sometimes regulations are mentioned but not especially relied on, as in Lucas v. Kansas City Structural Steel Co., 281 U. S. 264 (1930). As shown by the cases cited in note 4 *supra*, the lower federal courts are somewhat confused with respect to the proper application of this principle; but the prevailing tendency at present is to carry it rather far. *E.g.*, Hadley Falls Trust Co. v. United States, 110 F.(2d) 887 (C. C. A. 1st, 1940).

[7] McCaughn v. Hershey Chocolate Co., 283 U. S. 488 (1931); Universal Battery Co. v. United States, 281 U. S. 580 (1930).

of a tariff law,[8] where the Court, in following the Treasury regulations, said,

> This construction of the department has been followed for many years, without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the government to question its correctness, except in the present instance. The regulation of a department of the government is not of course to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.[9]

Other applications of the same technique in construing difficult provisions of the customs laws are readily found.[10]

In cases not involving governmental revenue, the principle has obviously a rather limited, though probably increasing, scope. At any rate, it has been applied in cases involving the rulings of the Interstate Commerce Commission [11] and other administrative and executive bureaus and departments.[12] The rule is stated very similarly in revenue and non-revenue cases, and the technique is essentially the same. It would seem clear that these non-revenue cases offer valuable analogies when dealing with revenue statutes.

The theory of the general rule is, of course, that Congress by reenacting the statute which has been construed by an administrative ruling thereby approves the ruling and makes it to some extent a part of the reenacted statute. There is obviously some real sense in this theory; but its very vagueness and the difficulty of stating it precisely imply that the courts err when they attempt to assert it in rigid terms. The Circuit Court of Appeals for the

[8] Robertson v. Downing, 127 U. S. 607 (1888). There is at least one earlier case where the same theory was applied. Hahn v. United States, 107 U. S. 402 (1882).

[9] 127 U. S. at 613.

[10] National Lead Co. v. United States, 252 U. S. 140 (1920); United States v. Baruch, 223 U. S. 191 (1912); Komada & Co. v. United States, 215 U. S. 392 (1910); United States v. Cerecedo Hermanos y Compagnia, 209 U. S. 337 (1908); United States v. Falk & Co., 204 U. S. 143 (1907).

[11] Louisville & N. R. R. v. United States, 282 U. S. 740 (1931); New York, N. H. & H. R. R. v. ICC, 200 U. S. 361 (1906).

[12] Inland Waterways Corp. v. Young, 309 U. S. 517 (1940); United States v. Shreveport Grain & El. Co., 287 U. S. 77 (1932); United States v. Reynolds, 250 U. S. 104 (1919); United States v. Midwest Oil Co., 236 U. S. 459 (1915); United States v. Grimaud, 220 U. S. 506 (1911).

Eighth Circuit, a few years ago, examined the court decisions (particularly those of the Supreme Court) in which this rule had been advanced, and discovered considerable variation, though with a tendency for the language to become more rigid.[13] The court reached the conclusion that in cases of reenactment " the courts will accept that construction unless it be 'plainly erroneous.' "

In fact, there is much variation in language, even sometimes in a single case. Probably the least rigid statement of the rule is to the effect that the courts will give much respect to an interpretative regulation under these circumstances.[14] Then too, it is oftentimes stated that the courts will give great weight to the administrative construction.[15] This principle is sometimes stated negatively [16] and with other variations,[17] but the apparent meaning of probably the majority of the cases is most nearly consistent with this test.

Another slightly more rigid formulation of the rule gives primary consideration to the intention of Congress. A frequent statement is that Congress by reenacting the statute which has been administratively construed thereby manifests its approval of such construction. This theory was fully expounded by the Supreme Court in its decision of *Massachusetts Mutual Life Insurance Co. v. United States*,[18] where it was said,

> The Congress in the Revenue Acts of 1928 and 1932 reenacted Sec. 245 without alteration. This action was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so

[13] Walker v. United States, 83 F.(2d) 103, 106, 107 (C. C. A. 8th, 1936).

[14] Fawcus Machine Co. v. United States, 282 U. S. 375, 378 (1931); Hahn v. United States, 107 U. S. 402, 406 (1882).

[15] Spring City Foundry Co. v. Commissioner, 292 U. S. 182, 189 (1934); Burnet v. Chicago Portrait Co., 285 U. S. 1, 16 (1932); United States v. Reynolds, 250 U. S. 104, 109 (1919).

[16] Brewster v. Gage, 280 U. S. 327, 336 (1930); Heiner v. Colonial Trust Co., 275 U. S. 232, 235 (1927).

[17] United States v. Shreveport Grain & El. Co., 287 U. S. 77, 84 (1932) (" Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it "); Universal Battery Co. v. United States, 281 U. S. 580, 583 (1930) (administrative ruling " ought not to be disturbed now unless it be plainly wrong "); Lucas v. American Code Co., 280 U. S. 445, 449 (1930) (" should not be interfered with unless clearly unlawful ").

[18] 288 U. S. 269 (1933).

to do requires the conclusion that the regulation was not inconsistent with the intent of the statute . . . unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. . . . The petitioner insists that the statute needs no interpretation and its plain mandate should be enforced. But on examination the proper application of the section is not so clear as is claimed.[19]

This language may smack more of rationalization than of accuracy. Yet it seems valid, subject to the possible question of the actual knowledge of Congress of the administrative rulings allegedly approved — a problem which will be considered below.[20]

But the Court has gone even further. It has said that such reenactment of a statute amounts to a " confirmation," [21] " ratification," [22] or " adoption " [23] of such rulings by Congress. It is not clear whether there is any precise difference in meaning among these three expressions, and even less clear whether any means really much more than approval. However, they seem to have led to the recent most rigid formulation of the rule. This is the theory that the reenactment of a revenue statute already construed by the Bureau invests such construction with the force of law.

That this was originally conceived of as merely a logical extension of the previous statements is shown by the language of the court in *Hartley v. Commissioner*,[24] which seems to have been the first clear formulation of this idea. Here the Court said that the reenactment " was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law." It does not necessarily follow that approval of a ruling by Congress is equivalent to its enactment;

[19] 288 U. S. at 273. Other cases to somewhat the same effect are Taft v. Commissioner, 304 U. S. 351, 356 (1938); Lang v. Commissioner, 304 U. S. 264, 270 (1938); Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 179 (1934); Old Colony R. R. v. Commissioner, 284 U. S. 552, 557 (1932); McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 492 (1931); Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 307 (1931); National Lead Co. v. United States, 252 U. S. 140, 146 (1920); United States v. Midwest Oil Co., 236 U. S. 459, 471 (1915).

[20] See pp. 383–84 *infra*.

[21] McFeely v. Commissioner, 296 U. S. 102, 108 (1935).

[22] United States v. Safety Car Heating & L. Co., 297 U. S. 88, 95 (1936); Reinecke v. Smith, 289 U. S. 172, 175 (1933).

[23] Morgan v. Commissioner, 309 U. S. 78, 81 (1940); Komada & Co. v. United States, 215 U. S. 392, 396 (1910); United States v. Falk & Brother, 204 U. S. 143, 152 (1907).

[24] 295 U. S. 216, 220 (1935).

but the " force of law " theory has been followed several times.[25] It was most fully defined in *Helvering v. R. J. Reynolds Tobacco Co.*,[26] where the court said,

> Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested, the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statutory provision unaltered after a change in the applicable regulation.[27]

II

In view of the vigorous criticism to which it has been recently subjected, it seems appropriate to consider briefly the validity of the rule which gives great weight to administrative construction where the statute construed has been reenacted.

The first objection is that the rule is purely fictional; Congress neither knows nor can be expected to know about the administrative constructions of the statute, and its reenactment of the statute, therefore, indicates not even the slightest approval of the rulings.[28] It has indeed been pointed out that with respect to laws as intricate as our recent internal revenue statutes, the rulings are frequently contradictory, so that any theory which prescribes Congressional approval of existing rulings to reenactment may lead to subsequent inconsistent claims as to what Congress has actually approved or enacted.[29]

Anyone at all acquainted with actual legislative processes knows that this criticism has considerable force. Even assuming the clarity and consistency of the administrative rulings with respect to the construction of a particular section, it is generally absurd to expect the members of the Congress to be familiar with them.

---

[25] *See* Helvering v. Winmill, 305 U. S. 79, 83 (1938).

[26] 306 U. S. 110 (1939).

[27] 306 U. S. at 116–17.

[28] This criticism is most clearly stated by Paul, *Use and Abuse of Tax Regulations in Statutory Construction* (1940) 49 YALE L. J. 660. See also Cole, *From Treasury Decision to Judicial Decision* (1934) 12 TAX MAG. 531.

[29] See 1 PAUL AND MERTENS, THE LAW OF FEDERAL INCOME TAXATION (1934 & Supps.) § 3.19.

Nevertheless, this argument proves too much. If members of Congress are usually not conversant with the rulings construing statutes, they are not generally conversant with the statutes themselves — especially with such complicated and technical language as is invariably present in revenue legislation. Yet no one doubts that Congress enacts the statutes, though most of its members are not even vaguely apprised of their texts. The practical saving feature is that the committees of Congress having the particular legislation under consideration are usually reasonably conversant with the details. It does not seem absurd to suppose that such committees, with the competent legal advice which they have available, would normally be familiar not only with the statutes which they are considering for reenactment, but also with the important and undisputed administrative rulings construing them. Indeed, the Court has sometimes adverted to the problem of Congressional knowledge of such rulings,[30] and has, in a few instances, declined to give effect to them where the facts indicated that Congress was presumably unacquainted with such rulings.[31] It would seem, therefore, that this criticism, while properly leading to caution in the application of the rule, is, nevertheless, not a decisive objection either to its reality or to its usefulness.

Another criticism leveled at the rule is the alleged failure of the courts, in applying it, to distinguish between the so-called " legislative " and " interpretative " rulings.[32] By this, it is meant that

[30] See, *e.g.*, United States v. Safety Car Heating & L. Co., 297 U. S. 88, 95 (1936). Where Congress is informed of the rulings and requested to change the statute to do away with them, but refuses, the argument of Congressional approval is, of course, very strong. Poe v. Seaborn, 282 U. S. 101, 116 (1930). *But cf.* Moore v. Cleveland Ry., 108 F.(2d) 656, 660 (C. C. A. 6th, 1940).

[31] Helvering v. New York Trust Co., 292 U. S. 455, 468 (1934); Dollar Savings Bank v. United States, 19 Wall. 227, 237 (U. S. 1873); *cf.* Casey v. Sterling Cider Co., 294 Fed. 426, 429 (C. C. A. 1st, 1923).

In Biddle v. Commissioner, 302 U. S. 573, 582 (1938), the Supreme Court made a rather surprising, not to say absurd, application of this principle. Here the question was whether a British income tax paid by corporations but deducted from dividends is a foreign " income tax " as to which American stockholders are entitled to credit. Concededly, there were several treasury rulings (since revoked) which permitted this credit. The Court refused to follow the older rulings, though they survived reenactments of the credit provision, on the rather ludicrous ground (among others) that these rulings construed a foreign not an American statute, and so were presumably not known to Congress.

[32] For the strongest recent statement of this point, see Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 COL. L. REV. 252. See also Surrey, *The*

the courts should give more weight to regulations explicitly permitted by the statute, filling holes deliberately left open, than to rulings merely purporting to interpret the meanings of substantive provisions in the statute. Rulings explicitly permitted by the statute usually, though not always, deal primarily with administration; but they are legislative in effect, subject, of course, to the limitations with respect to delegation of legislative power.[33] Such regulations may themselves be regarded as vested with the force of law to the extent that they are consistent with the statutes. Therefore a reenactment of a statute by Congress, while clearly not necessary, is of weight as an approval of the "legislative" regulation. On the other hand, a regulation or other administrative ruling which merely purports to construe the statute — although even this type of regulation is also undoubtedly authorized by Congress — is to be accorded no greater effect than any construction by presumably competent persons, and the argument that greater weight is given to it by reenactment of the statute is, therefore, somewhat less persuasive.

It cannot be said that the Supreme Court has wholly disregarded this distinction. There are at least two cases where the Court has followed an administrative construction of a statute which had been reenacted, with at least more confidence because of the fact that the regulations were explicitly authorized by the statute itself.[34] Nevertheless, the Court has not given this distinction much effect.

The suggestion that this distinction be given more effect seems to have considerable force. Nevertheless, like most legal differences, the distinction is only one of degree. Greater weight should perhaps be given to regulations explicitly authorized by statute than to rulings merely purporting to construe the statute; nevertheless, the latter type of administrative ruling is entitled to weight,

---

Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes (1940) 88 U. OF PA. L. REV. 556; Note (1939) 52 HARV. L. REV. 1163 *et seq.*

[33] This delegation of power to make administrative rules, which are in fact legislative in nature, is subject to some limitations. *Cf.* Panama Refining Co. v. Ryan, 293 U. S. 388, 414 (1935). But the permitted scope is very broad [United States v. Grimaud, 220 U. S. 506, 516 (1911)], and especially so in revenue cases. Boske v. Cumingore, 177 U. S. 459, 468 (1900).

[34] Burnet v. S. & L. Building Corp., 288 U. S. 406, 415 (1933); Fawcus Machine Co. v. United States, 282 U. S. 375, 378 (1931).

especially where clear and well-understood, and where Congress has reenacted the part of the statute thus construed while the rulings were in effect.

A third criticism has been made, applicable only to those administrative rulings which are brought into play in controversies to which the Government is a party. However, this covers most administrative rulings, and all which construe revenue acts. It is asserted that the courts should disregard all such rulings, since they are certain to favor the Government.[35]

No doubt most Treasury regulations do tend to favor the Government in doubtful cases, but the universal truth of the proposition is emphatically disproved by the Treasury's vigorous and sometimes unsuccessful efforts to escape some of its previous rulings which turned out to be all too favorable to taxpayers — or at least so the Treasury thought.[36] It would seem therefore that this criticism is of little weight, except insofar as it might induce the courts to be cautious in applying the rule to a regulation blatantly and unfairly favoring the Government, merely because Congress has reenacted the statute without expressly negativing the ruling. It is interesting to note, however, that the author of a recent article, an important official of the Treasury Department, who argues vigorously and effectively against the whole doctrine, nevertheless concedes that the Commissioner of Internal Revenue should be held to some degree to his own regulations.[37]

It would seem that the general rule that the courts should give considerable weight to administrative rulings construing a statute, especially when the part of the statute thus construed has been reenacted by Congress, is sound and should be approved. However, the practical value of this principle depends largely upon its application. If it is applied woodenly and as a flat rule of law, it will not only lead both government and taxpayers into logical blind alleys, but it will destroy the whole purpose of administration — flexibility.[38] Such an application of the rule leads the courts into

[35] See Cole, *From Treasury Decision to Judicial Decision* (1934) 12 TAX MAG. 531.

[36] *E.g.*, Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 (1939); Zellerbach Paper Co. v. Helvering, 293 U. S. 172 (1934).

[37] See Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes* (1940) 88 U. OF PA. L. REV. 556.

[38] See Note (1940) 38 MICH. L. REV. 391.

such decisions as *Helvering v. Wilshire Oil Co.* where the Court had to resort to rather abstruse reasoning to escape the consequences of the rigid rule it had imposed upon itself in the *Reynolds Tobacco* case. In fact, the Court will not and cannot follow any rigid application of the rule. The only practical solution is to use the rule as an aid to proper construction of the statute and not as an end in itself. This is what the Court has actually done. Its difficulties have come when it has failed to admit frankly that the whole doctrine has no greater scope than this.

III

Indication that the Court has not in fact applied the reenactment rule rigidly is found in certain limitations to this rule which the Court recognizes. Some of these so-called limitations are actually partial negations of the rule. It is true that the general doctrine of almost conclusive weight to administrative rulings where the statute has been reenacted is not necessarily made inapplicable merely because the rulings are of questionable soundness.[39] But, on the other hand, a ruling is not to be ignored merely because the part of the statute which it purports to construe has not been reenacted by Congress. Such rulings have been considered and followed by the Supreme Court,[40] though their weight is less because of the fact that the statute has not been reenacted.[41] Nevertheless, this seems to make the effect of reenactment of the statute little more than that of adding weight to the ruling, not of actual enactment by Congress of the ruling as part of the law.

But far more serious are the decisions of the Court to the effect that administrative rulings will not be followed, even though the statute has been reenacted while they were in force, if they are contrary to the terms of the statute.[42] With respect to income

[39] Komada & Co. v. United States, 215 U. S. 392 (1910). *Cf.* New York, N. H. & H. R. R. v. ICC, 200 U. S. 361 (1906).

[40] McCaughn v. Hershey Chocolate Co., 283 U. S. 488 (1931).

[41] Hesslein v. Hoey, 91 F.(2d) 954, 956 (C. C. A. 2d, 1937), *cert. denied*, 302 U. S. 756 (1937).

[42] Louisville & N. R. R. v. United States, 282 U. S. 740 (1931); Lynch v. Tilden Produce Co., 265 U. S. 315 (1924); Waite v. Macy, 246 U. S. 606 (1918); Morrill v. Jones, 106 U. S. 466 (1882); Dollar Savings Bank v. United States, 19 Wall. 227 (U. S. 1873). And see the quotation from Massachusetts Mutual Life Ins. Co. v. United States, 288 U. S. 269, 273 (1933), pp. 381–82 *supra*.

taxation, the Court has remarked that "Treasury regulations can add nothing to income as defined by Congress." [43] The general position of the Court as to this is well summarized by the following language from *Manhattan General Equipment Co. v. Commissioner*: [44]

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law — for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.[45]

This modification of the rule seems sensible enough; but it really negates the statement that reenactment by Congress of a statute gives administrative rulings construing that statute the force of law. The Court says that the rule does not apply "where the law is plain," [46] but presumably the law is not plain if the administrative authorities, supposed experts on that particular problem, have misconstrued it. It is said that the administrative authorities have no power to amend the law; [47] but if reenactment of the law includes administrative construction, the law has been amended, if at all, by Congress and not by the administrative authorities who promulgated the construction. It is submitted, therefore, that this so-called limitation of the doctrine in fact negatives it as a flat rule of law. In reality, it offers an illogical but reasonably effective escape from the embarrassment arising out of the attempt to transform the general principle of giving great weight to administrative constructions where the law has been reenacted, into a rigid rule of conclusiveness. But it would be still better to avoid such a rigid formulation, and to treat the rule frankly as a mere aid in the construction of the statute. Then the Court could say that a regulation which was in its opinion contrary to the terms of the statute was simply to be disregarded.

Another rather serious limitation to this rule, and one which

[43] *See* M. E. Blatt Co. v. United States, 305 U. S. 267, 279 (1938).

[44] 297 U. S. 129 (1936).

[45] 297 U. S. at 134.

[46] *See* Biddle v. Commissioner, 302 U. S. 573, 582 (1938).

[47] *See* Koshland v. Helvering, 298 U. S. 441, 446 (1936).

again throws doubt upon it as an absolute rule of law, is that the courts will disregard administrative rulings which are ambiguous, uncertain, or effective for but a short time,[48] even though the statute has been reenacted during their continuance.[49] The decisions to this effect are fairly summarized by the following language from *Burnet v. Chicago Portrait Co.*: [50]

> The familiar principle is invoked that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration. . . . But the qualification of that principle is as well established as the principle itself. The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons. . . . Moreover, ambiguous regulations are of little value in resolving statutory ambiguities.[51]

Perhaps the Court's disregard of an ambiguous ruling is not inconsistent with the rule that such ruling is incorporated in the statute by a subsequent reenactment, for the statute so "amended" is still ambiguous. But the mere fact that a ruling has not been in effect for any considerable period would seem logically not to affect its application, except insofar as its newness at the time of the reenactment of the statute might tend to show lack of knowledge of the ruling by Congress. Here, too, we have a desirable limitation of the doctrine, but a limitation which actually (and wisely) tends to change it from a flat rule of law to a flexible principle of statutory construction.

Where the existing administrative rulings are actually in conflict, the courts naturally tend to ignore them all.[52] This, too, seems logically, as well as practically, justifiable. Yet, in at least one case,[53] the Court considered and followed an administrative

[48] Haggar Co. v. Helvering, 308 U. S. 389 (1940); Iselin v. United States, 270 U. S. 245 (1926); Hesslein v. Hoey, 91 F.(2d) 954 (C. C. A. 2d, 1937), *cert. denied*, 302 U. S. 756 (1937); Casey v. Sterling Cider Co., 294 Fed. 426 (C. C. A. 1st, 1923).

[49] Higgins v. Smith, 308 U. S. 473 (1940); Rasquin v. Humphreys, 308 U. S. 54 (1939).

[50] 285 U. S. 1 (1932).

[51] 285 U. S. at 16.

[52] *Cf.* Rasquin v. Humphreys, 308 U. S. 54 (1939); Estate of Sanford v. Commissioner, 308 U. S. 39 (1939); United States v. Mo. Pac. R. R., 278 U. S. 269 (1929); Red Wing Malting Co. v. Wilcutts, 15 F.(2d) 626 (C. C. A. 8th, 1926), *cert. denied*, 273 U. S. 763 (1927).

[53] United States v. Reynolds, 250 U. S. 104 (1919).

ruling construing a federal statute, which seemed to be inconsistent with certain previous rulings of the same department. This is an admirable example of the proper technique of using such rulings; the later ruling was concededly not conclusive, but was regarded as a well-considered construction of the statute by competent administrative authorities, which, in the absence of any substantial countervailing considerations, the Court decided to follow.

Another limitation, closely connected with the one just referred to, is that the courts consider themselves bound to follow only authoritative rulings. This is especially important in connection with the Bureau of Internal Revenue, where the necessarily elaborate organization, as well as the complexity of the statutes, frequently results in a flood of rulings with no high degree of consistency.[54] Mere informal rulings of the Bureau are regarded as of little authority,[55] and even General Counsel's Memoranda are regarded as of inferior standing to Treasury Decisions.[56] The latter are apparently of the greatest authority; indeed the regulations themselves are technically Treasury Decisions. But in some cases [57] the Court disregarded rulings of high officials of the Bureau, because such rulings were not approved by the Secretary of Treasury, as regulations of course must be.

No doubt, an argument of considerable weight can also be made here to the effect that Congress would be cognizant only of the more authoritative rulings. But, on the other hand, this nicety in evaluating the hierarchy of treasury rulings generally appears only when the Court is determined to disregard some rulings. The feeling cannot be escaped that this too is but an escape from the rigidity of the rule. The escape is highly desirable, but a proper formulation of the rule would make it unnecessary.

Still another limitation is that regulations or other administrative rulings which have been coerced, or were supposedly required, by court (or Board of Tax Appeals) decisions, are of little authority.[58] This is especially true where the court decision is regarded

[54] See 1 PAUL AND MERTENS, THE LAW OF FEDERAL INCOME TAXATION (1934 & Supps.) § 3.19.

[55] Helvering v. New York Trust Co., 292 U. S. 455, 468 (1934).

[56] *See* Helvering v. Wilshire Oil Co., 308 U. S. 90, 98 (1939).

[57] Biddle v. Commissioner, 302 U. S. 573, 582 (1938); Lynch v. Tilden Produce Co., 265 U. S. 315, 321 (1924).

[58] Higgins v. Smith, 308 U. S. 473 (1940); *accord*, Helvering v. Hallock, 309 U. S. 106 (1940).

as erroneous,[59] but applies also when the administrative officials are supposed to have misconstrued a proper decision.[60] There is, perhaps, no difficulty in this, even from a logical standpoint. But it does lead us into a concept which is still harder to understand or justify. If an administrative construction of a statute acquires the force of law by reenactment of the statute, it would seem even clearer that a court decision (at least one by the Supreme Court) construing the statute would have at least a like effect. In this case, no reenactment of the statute would seem to be necessary; but reenactment would add, if possible, to the conclusiveness of the court's construction. Then it must follow that if a court cannot change an administrative construction of a revenue statute under these circumstances, such change constituting an amendment, which can only be made by Congress, it is still less able to disregard its own decision construing the statute.

Of course, the Supreme Court has never had any difficulty in escaping from this beautifully logical but utterly absurd proposition. Indeed, the matter seems not to have undergone any serious consideration until the recent case of *Helvering v. Hallock*.[61] Here the Court overruled certain of its previous decisions construing a provision of the federal estate tax. Speaking through Mr. Justice Frankfurter, it dismissed briefly, but firmly, any argument that it is without power to overrule its own previous decisions merely because those decisions construe a revenue act which had been reenacted by Congress in the interval. It would seem that a court which can overrule its own erroneous construction of a statute is rather absurdly limiting its own powers by denying its authority to overrule a mere administrative construction.

Similarly, we have, in several cases, a frank admission by the Court that Treasury and other authoritative regulations will not be followed, even though the statute has been reenacted while they were in effect, if the result is deemed to be clearly undesirable. This is brought out in the quotation from *Burnet v. Chicago Portrait Co.*[62] above. It was also stated very clearly in *Estate of*

[59] Hartley v. Commissioner, 295 U. S. 216, 220 (1935).

[60] Morrissey v. Commissioner, 296 U. S. 344, 355 (1935).

[61] 309 U. S. 106 (1940). *But cf.* United States v. Raynor, 302 U. S. 540 (1938), where a decision of a Circuit Court of Appeals was disregarded, the Court saying [p. 552] that "One decision construing an act does not approach the dignity of a well settled interpretation."

[62] 285 U. S. 1, 16 (1932), p. 389 *supra*.

Sanford v. Commissioner,[63] a recent case construing the federal gift tax as not including a gift where the donor reserved the power to change beneficiaries. The Government, frankly though rather naïvely, admitted that its own regulations were inconclusive, and that it was not sure which holding would be most advantageous to the Treasury. The Court definitely stated that the regulations would be wholly disregarded, except those which tended to bring about a result deemed by the Court desirable and fair to both the Government and the taxpayers.

A word must here be said as to the meaning of "reenactment." Occasionally a statute which has been repealed is again enacted, this constituting in effect, if not technically, a reenactment. In such cases, the rulings as to the construction of the old act are of great weight as to the new act.[64] More frequently, however, an existing statute is amended in certain particulars, but this amounts to a reenactment of the parts not amended, and the rules previously discussed apply as to the parts not so amended. However, rulings with respect to the sections of the statutes amended are presumably no longer of any effect,[65] though new rulings of the Bureau as to their construction are to be given some weight, as previously explained.[66] The only exception is an amendment thought to have been aimed at clarifying, rather than changing the law; in such a case, the regulations construing the old law may be considered as of some weight in the construction of the new law.[67]

IV

As previously intimated, the federal courts use other techniques in solving controversies about the construction of revenue and other federal statutes. The fact that the particular part of the statute in question has been the subject of administrative con-

[63] 308 U. S. 39, 53 (1939). See also United States v. Mo. Pac. R. R., 278 U. S. 269, 278 (1929), where the Court intimated that the express terms of the statute itself might not be followed when they lead "to absurd or impractical consequences."

[64] Latimer v. United States, 223 U. S. 501, 504 (1912).

[65] Brewster v. Gage, 280 U. S. 327, 337 (1930); Hecht v. Malley, 265 U. S. 144, 153 (1924); Kansas City So. Ry. Co. v. United States, 252 U. S. 147, 151 (1920).

[66] *See* Taft v. Commissioner, 304 U. S. 351, 357 (1938).

[67] *See* Hartley v. Commissioner, 295 U. S. 216, 220 (1935).

struction, and that this construction has survived one or more reenactments of the statute by Congress, is never deemed to preclude the use of these other, and perhaps inconsistent, aids in reaching a judicial decision on the point. Some of these other aids may be briefly considered, especially to determine how far their use is consistent with an absolute rule that the reenactment of a statute which has been construed by an executive ruling transforms such construction into a rule of law.

We have seen that administrative regulations may not be followed, even though the statute has been reenacted, if the result is deemed undesirable.[68] Conversely, where the regulations are followed, the courts often buttress their conclusions by considering the desirability of the result and its conformity to the language and general intention of the statute.[69]

The most frequently occurring instance of Supreme Court approval of a regulation because of the desirability of its result arises in cases involving those regulations which prevent a double use by a taxpayer of the same deduction in computing taxable income.[70] However, the Court has in other cases [71] expressed its satisfaction with the results obtained by following the regulations, or after observing that the regulations point one way, has considered the problem on principle, and has followed the regulations only after being satisfied that the result was reasonable and fair.[72]

It cannot be contended that there is a patent inconsistency in asserting that a regulation is binding and then considering the matter on principle, if the regulation is ultimately followed. But the Court is wasting time and trouble in considering the desirability of a regulation if that regulation has become a part of the law through reenactment of the statute by Congress. That the Court is actually not wasting its time in determining the desira-

[68] See cases cited in notes 62 and 63 *supra*.

[69] *E.g.*, Swigart v. Baker, 229 U. S. 187, 199 (1913).

[70] Charles Ilfeld Co. v. Hernandez, 292 U. S. 62 (1934); United States v. Dakota-Montana Oil Co., 288 U. S. 459 (1933); Burnet v. Thompson Oil & Gas Co., 283 U. S. 301 (1931).

[71] Burnet v. S. & L. Bldg. Corp., 288 U. S. 406, 414 (1933); Robertson v. Downing, 127 U. S. 607, 612–13 (1888).

[72] Morrissey v. Commissioner, 296 U. S. 344 (1935). *Cf.* Heiner v. Colonial Trust Co., 275 U. S. 232 (1927).

bility of the regulation is clear; but this shows that the regulation is in fact not regarded as binding.

Another aid often invoked by the courts in determining the proper construction of a controverted provision of a statute is the history of the act — even where the statute has been administratively construed.[73] Of course, the Supreme Court has never had any doubt that the legislative history of the act is a mere aid to its construction, and indeed is wholly immaterial except in cases of substantial ambiguity in the language of the statute.[74]

Even more important, perhaps, is the administrative history — that is, administrative practice, apart from definite rulings, in connection with the statute. This will often be accorded great weight in reaching a decision on a doubtful point of construction.[75] Where the administrative practice has been written into a subsequent act, the weight accorded it is thereby increased,[76] though Congressional failure to legalize a particular practice does not necessarily prove that the practice was not authorized by the statute as it stood.[77] Administrative practice has recently been held to be of some moment even in the consideration of a constitutional question.[78]

In several cases, legislative and administrative practices were considered together, as both pointed the same way.[79] It is clear, however, that neither will be followed except to the extent that

[73] Helvering v. Twin Bell Oil Syndicate, 293 U. S. 312, 322 (1934); New York Life Ins. Co. v. Bowers, 283 U. S. 242, 246–47 (1931).

[74] *See* United States v. Mo. Pac. R. Co., 278 U. S. 269, 278 (1929).

[75] *Cf.* Swigart v. Baker, 229 U. S. 187 (1913).

[76] Mason v. Routzahn, 275 U. S. 175, 178 (1927); United States v. Midwest Oil Co., 236 U. S. 459, 480 (1915).

[77] Moore v. Cleveland Ry., 108 F.(2d) 656 (C. C. A. 6th, 1940). Here administrative practice, by which the filing of a waiver by a taxpayer was given the effect of stopping the running of interest on a deficiency, was followed, although a recommendation of a House committee (made Jan. 14, 1938) for a statute explicitly legalizing this practice was not carried out by Congress. The Court stated that Congressional inaction was to be given little weight because of the disturbed domestic and foreign situation when the recommendation was made, and since then.

[78] Inland Waterways Corp. v. Young, 309 U. S. 517, 525 (1940). *Cf.* Burnet v. Wells, 289 U. S. 670, 678 (1933). *But cf.* Fairbank v. United States, 181 U. S. 283 (1901), where the Court refused to follow legislative and administrative practice favoring the constitutionality of a tax on export bills of lading, on the ground that this was not a question of doubt, in view of the express constitutional prohibition of a tax on exports.

[79] United States v. Dakota-Montana Oil Co., 288 U. S. 459 (1933); Norwegian

the Court considers it desirable and consonant with the words and spirit of the statute.[80] In particular, negative administrative practice — that is mere failure to act — is regarded as of little weight in determining the limits of permissible action under the statute.[81] In one case,[82] the Court preferred to follow administrative practice rather than a result indicated by the legislative history of the act, saying,

> These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic aid in an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it.[83]

It is apparent that the Court is not here stating that administrative practice, rather than legislative history, must always be followed in construing a statute. But under the particular circumstances, the administrative practice was persuasive, and the arguments deduced from legislative history were not. Both are useful devices; but neither one, or both together, is necessarily decisive in any particular case. And here too we see the courts properly using a technique for reaching a correct construction of the statute, which, if not inconsistent with the rule that an executive ruling surviving a reenactment is conclusive, is at least quite unnecessary and therefore seemingly improper under such a rule. But the impropriety plainly is not in the statement that the ruling is an important and weighty aid to the correct construction of the statute, but rather in the contention that it is itself a part of the statute.

Nitrogen Products Co. v. United States, 288 U. S. 294 (1933); Swigart v. Baker, 229 U. S. 187 (1913).

[80] *See* Costanzo v. Tillinghast, 287 U. S. 341, 345 (1932).

[81] Union Stock Yard and T. Co. v. United States, 308 U. S. 213, 224 (1939); Louisville & N. R. R. v. United States, 282 U. S. 740, 757 (1931); Kansas City So. Ry. v. United States, 252 U. S. 147, 151 (1920).

[82] United States v. Shreveport Grain & El. Co., 287 U. S. 77 (1932).

[83] 287 U. S. at 84.

Finally, the courts do not, in construing a statute, disregard the factor of administrative convenience. Where the rulings are in conflict and those which give the greater administrative convenience uncertain, this point will usually be ignored.[84] But a ruling which is clearly unjustified by administrative convenience may be disregarded on that ground alone, where it is not considered to be a necessary result of the terms of the statute.[85] However, a ruling which has survived one or more reenactments will not necessarily be disregarded merely because it apparently does not conduce to administrative convenience.[86] In other words, administrative convenience is a factor to be considered in appraising executive constructions of a statute, but it is not necessarily decisive, nor even generally of great weight.

Furthermore, factors of administrative convenience, even apart from rulings, may have some weight in connection with the construction,[87] and even as to the constitutionality,[88] of statutes. It may be freely admitted that these are considerations of less weight than a deliberate administrative ruling, even where the statute thus construed has been reenacted. Nevertheless, both are basically mere aids to the proper construction of the statute; neither should necessarily be decisive, and an administrative ruling, even when " approved " by Congress, is actually no more a rule of law than an administrative practice or even a consideration of administrative convenience, either of which may have the same approval.

Conclusion

The conclusion seems rather obvious. No difficulty would have arisen if the Supreme Court had kept certain principles clearly in mind. They are as follows: —

The problem in this class of cases is solely one of statutory construction. It follows that the courts should look first at the

---

[84] *E.g.*, Estate of Sanford v. Commissioner, 308 U. S. 39 (1939).

[85] Haggar Co. v. Helvering, 308 U. S. 389, 398 (1940).

[86] Hadley Falls Trust Co. v. United States, 110 F.(2d) 887, 892 (C. C. A. 1st, 1940).

[87] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 303 *et seq.* (1933).

[88] Burnet v. Wells, 289 U. S. 670, 678 (1933). *Cf.* Inland Waterways Corp. v. Young, 309 U. S. 517, 525 (1940).

text of the statute, since no problem really exists unless substantial ambiguity is evident. When such ambiguity does exist, the court should summon to its aid all proper and useful assistance to arrive at a correct and desirable construction. Existing administrative constructions are entitled to great weight, especially if the part of the statute thus construed has been reenacted by Congress. But such rulings cannot be considered as absolutely conclusive; they are merely aids to the construction of the statute, usable in connection with, but not exclusive of, other aids and the court's own sense of what is reasonable and just. To give administrative rulings greater weight than most other aids to statutory construction is reasonable and, in most instances, probably correct; but to make them conclusive and binding on the courts is unjust, unworkable and absurd.

As already pointed out, the Supreme Court has in fact not permitted itself to be bound by administrative rulings of which it disapproved, no matter how many times the statute which these rulings purport to construe have been reenacted by Congress. The only damage which the Court has done has been the result of its too fervent language in a few cases. Nevertheless, the injury is not irreparable; the error is purely verbal and very recent.[89] All that is needed is a clear statement by the Supreme Court disapproving any idea that an administrative ruling can ever become a rule of law other than through explicit incorporation into the terms of the statute. This will not require the overruling of a single decision, but merely the withdrawal of a small amount of ill-considered and very troublesome language. When this is done, the Supreme Court and the lower federal courts can use administrative rulings as aids in construing statutes, and need not allow this particular kind of aid to become the master of the statutes and the courts.

Robert C. Brown.

INDIANA UNIVERSITY
SCHOOL OF LAW.

[89] What appears to be the earliest clear statement of this extreme "force of law" concept, in Hartley v. Commissioner, 295 U. S. 216, 220, goes back only to 1935.